

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST  
REPUBLIC OF SRI LANKA**

In the matter of an application for Revision in terms of Article 138 of the Constitution read with Section 364 of the Code of Criminal Procedure Act No.15 of 1979.

**Court of Appeal**

The Democratic Socialist Republic of Sri

**Application No:**

Lanka

**CPA/123/2022**

**COMPLAINANT**

**High Court of Gampaha**

**Vs.**

**No.HC/81/22**

1. Duwage Sithum Vismitha Alwis

**Mahara MC case No.**

2. Mirihana Kankanamalage Ruwan

**B/1043/2021**

Chamara

**ACCUSED**

**AND NOW**

2. Mirihana Kankanamalage Ruwan

Chamara

**ACCUSED-PETITIONER**

The Attorney General

Attorney General's Department

Colombo-12.

**COMPLAINANT-RESPONDENT**

**BEFORE** : **Sampath B. Abayakoon, J.**  
**P. Kumararatnam, J.**

**COUNSEL** : **Neranja Jayasinghe with**  
**D.D.K.Katugampola for the Petitioner.**  
**Ridma Kuruwita, SC for the**  
**Respondent.**

**ARGUED ON** : **27/03/2023.**

**DECIDED ON** : **31/05/2023.**

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### **BAIL ORDER**

**P.Kumararatnam,J.**

The Petitioner filing this Application has invoked the jurisdiction of this Court to grant bail to him upon suitable condition as this Court consider appropriate.

The Petitioner had applied for bail in the High Court of Gampaha in HC/Negombo/Bail Application No.81/2022. After an inquiry, the Learned High Court Judge had refused bail on 07.09.2022. Aggrieved by the said order, the Petitioner had filed this Revision Application to revise the said order.

On 01.04.2021, The Petitioner was arrested by officers from the Police Narcotic Bureau alleging that he had aided and abetted 1<sup>st</sup> accused named above to traffic 186 grams of Heroin (Diacetylmorphine) and

possessing Rs.173,000/- at the time of arrest which was allegedly to have been earned by Heroin transactions.

The Petitioner and the 1<sup>st</sup> suspect were produced, and facts were reported to the Mahara Magistrate under Section 54A(b) and 54A(c) of the Poisons Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984 and a detention order was obtained for further investigations under Section 82(3) of the said Act.

The production had been sent to the Government Analyst Department on 05/04/2021. After analysis, the Government Analyst had forwarded the report to Court on 20/05/2021. According to the Government Analyst, 32.05 grams of pure Heroin (Diacetylmorphine) had been detected from the substance sent for the analysis.

The Petitioner was indicted in the High Court of Gampaha under two counts namely:

2. The accused Petitioner aided and abetted the 1<sup>st</sup> accused on the indictment to traffic 32.05 grams of Heroin punishable under Section 54A (b) of the Poisons, Opium and Dangerous Drugs (Amendment) Act No.13 of 1984 read with under Section 102 of the Penal Code.
3. The accused Petitioner was in possession of Rs.173,000/- at the time of arrest which was earned by Heroin transactions and thereby committed an offence under Section 3(1) of the Money Laundering Act No.05 of 2006.

The contention of the prosecution is that the 1<sup>st</sup> accused had come in a three-wheeler and got down at Srimavo Bandaranayake Mawatha in Sapugaskanda. At that time, he was taken into custody by the officers of the Police Narcotics Bureau and recovered a parcel contained Heroin from his trouser pocket. The Petitioner was the driver of the three-wheeler in which the 1<sup>st</sup> accused had travelled. It was also alleged that the Petitioner was in possession of Rs.173,000/- which the officers of

the Police Narcotics Bureau had suspected as the money earned by Heroin transactions.

The contention of the Petitioner is that the said money was recovered from his house and the money had been earned through lawful means. Hence, he vehemently denies the above allegation.

Although the Petitioner have three previous convictions the operation period the suspended sentence in all three cases were over at present.

The Petitioner has pleaded following exceptional circumstances in support of his Revision Application.

1. According to the facts of the case the prosecution will not be able to prove a prima facie case against the Petitioner.
2. In the light of the facts of this case the remand period that the Petitioner had spent could be considered as an exceptional ground.

In **Nasher v. Director of Public Prosecution [2020] VSCA 144** the court held that:

*“a combination of delay, onerous custodial conditions, and the relative weakness of the prosecution case may, when considered with all relevant circumstances, compel the conclusion that exceptional circumstances have been established”.*

According to the Learned State Counsel, the Petitioner was arrested in connection of aiding and abetting the 1<sup>st</sup> accused of trafficking of 32.05 grams of Heroin. Steps had already been taken to indict the Petitioner in the High Court of Gampaha and the case number is HC 81/2022. The trial is fixed for 10<sup>th</sup> and 30<sup>th</sup> May,2023 and summons had already been sent to all necessary witnesses. Hence, Learned State Counsel submitted that the delay is not an exceptional circumstance to be

considered to enlarge the suspect on bail. Further, the time spent for preparing the indictment does not constitute an exceptional circumstance.

The Counsel for the Petitioner submits that the suspect is in remand for little more than two years. Considering the facts and the circumstances of this case, the prosecution will not be able to establish a prima facie case against the Petitioner.

Exceptional circumstances are not defined in the statute. Hence, what is exceptional circumstances must be considered on its own facts and circumstances on a case by case.

In **Ramu Thamodarampillai v. The Attorney General [2004] 3 SLR 180** the court held that:

*“the decision must in each case depend on its own peculiar facts and circumstances”.*

In **CA(PHC) APN 17/12 and CA(PHC) APN 16/12** the court observed the fact that indictment was not served even after the laps of one year from the producing of the Government Analyst’s Report was considered as exceptional circumstances.

In **CA(PHC)APN 107/2018** decided on 19.03.2019 held that remanding for a period of one year and five months without being served with the in indictment was considered inter alia in releasing the suspect on bail.

According to the Petitioner, at present her family is going through untold hardship without proper income and care. The Petitioner admits that he had three previous convictions and in all three cases he was awarded suspended sentence and the operational period of all the cases

were over. The Petitioner had attached his previous conviction report along with the Petition.

In respect of the 3<sup>rd</sup> charge, the Petitioner submits that although he was indicted under Money Laundering Act, the prosecution will not be able to prove the same as the said money was not recovered from his custody at the time of arrest as alleged by the prosecution.

**The Section 83 of the Poison, Opium and Dangerous Drugs Act which was amended by Act No. 41 of 2022 states:**

83. (1) Subject to the provisions of sections 84, 85 and subsection (2) of this section, a person suspected or accused of an offence under sections 54A and 54B of this Ordinance, shall not be released on bail by the High Court except in exceptional circumstances.

(2) Notwithstanding the provisions of sections 84 and 85, a person suspected or accused of an offence under subsection (1) of section 54A and section 54B-

(a) of which the pure quantity of the dangerous drug, trafficked, imported, exported, or possessed is ten grammes or above in terms of the report issued by the Government Analyst under section 77A; and

(b) which is punishable with death or life imprisonment, shall not be released on bail except by the Court of Appeal in exceptional circumstances.

shall not be released on bail except by the Court of Appeal in exceptional circumstances.

In this case the pure quantity of Heroin detected in the production by the Government Analyst is 32.05 grams. Hence, this Court has jurisdiction to consider granting of bail as per the new amendment.

In this case, as per the submission of the Learned State Counsel that the indictment has been dispatched to the High Court High Court of Gampaha and the trial date had been already fixed. Although the indictment had been forwarded and the case is fixed for trial, the delay more than two year in remand does not falls into the category of excessive and oppressive delay considering the circumstances of this case.

Offences under Section 54A(b) and 54A(c) of the Poisons Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984 is no doubt serious offences but seriousness of the offence alone cannot form a ground to refuse bail. In considering these matters, the court must bear in mind the presumption of innocence.

Considering all these factors into account, I order the suspect to be granted with following strict bail conditions.

1. Cash bail of Rs.100,000/=.
2. To provide 02 sureties. They must sign a bond of two million each.
3. The suspect and the sureties must reside in the address given until conclusion of his case.
4. Not to approach any prosecution witnesses directly or indirectly or to interfere with.
5. To surrender his passport if any, to court and not to apply for a travel document. The Controller of the Immigration and Emigration is informed of the travel ban on the suspect.
6. To report to the Police Narcotics Bureau on the last Sunday of every month between 9am to 1pm.
7. Any breach of these conditions is likely to result in the cancellation of his bail.

The Learned High Court Judge of Gampaha is hereby directed to enlarge the suspect on the above bail conditions.

The Registrar of this Court is directed to send a copy of this order to the Officer-in-Charge of the Police Narcotics Bureau and the High Court of Gampaha.

The Application is allowed.

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**